Filed 6/15/09 Vu v. Nguyen CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PHUOC VU et al.,	
Plaintiffs and Respondents,	G039826
v.	(Super. Ct. No. 06CC01980)
DO NGUYEN et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Lee Tran & Liang, K. Luan Tran, James M. Lee and Daniel Yu for Defendants and Appellants.

Law Offices of David K. Tran, David K. Tran; Ng Do-Khanh, David K. Ng and Daniel D-Khanh for Plaintiffs and Respondents.

The plaintiffs and respondents in this case are Hoan Pham and her husband, Phuoc Vu, who own a jewelry supply business located in the Asian Garden Mall in Westminster (sometimes referred to collectively and in the singular as "Pham"). The defendants and appellants include Cao Cam Van (Van), her husband Tung Nguyen (Tung), two of their adult sons Do Nguyen (Do) and Luan Cao Nguyen (Luan), and one of their adult daughters Trinh Nguyen (Trinh). The defendants also include Hung-Son Jewelry (Hung-Son), the Nguyen family's jewelry business also located in the Asian Garden Mall, and Kim-Lan, a jewelry and gold business owned and operated by Luan.

Pham sued the Nguyen family, Hung-Son, and Kim-Lan, contending that over a period of time she loaned large quantities of gold (18 kilograms total) and cash ($60,000 total) to Van, which Van borrowed on behalf of her family to conduct their gold and jewelry businesses. Van wrote the details of each loan transaction on the back of a Hung-Son business card, which she dated and signed and gave to Pham to keep as a "marker" or "IOU" for the debt. For a while, Van paid Pham the agreed upon interest payments on the various loans but eventually ceased payment. Van replaced three kilograms of the gold she borrowed by giving Pham a number of gold "taels"[1] on various occasions, but some of those gold taels turned out to be less than pure gold.

A jury returned a verdict for Pham awarding $435,308 jointly and severally against all the defendants for breach of oral contract, various fraud and misrepresentation causes of action, conversion, and common count of money had and received. Appellants contend the trial court erred by admitting testimony of, and documents produced by, an impeachment witness who had not been disclosed by Pham during discovery and was not on her witness list. In the alternative, they contend the court erred by denying their motion for new trial brought on the grounds they were unfairly surprised by the impeachment witness whose testimony was not used simply to impeach but to prove

[1] A tael is a Chinese unit of weight. (Webster's 3d New Internat. Dict. (1981) p. 2327.)

substantive aspects of Pham's case. Appellants also contend the judgment against individual defendants Tung, Trinh, Luan, and Do is not supported by substantial evidence and the judgment improperly identified one of them with an erroneous fictitious name. We reject their contentions and affirm the judgment.

FACTS

Pham's Case

Pham

Pham testified that when she and her family left Vietnam in 1975 and came to the United States, they brought with them gold and diamonds from their jewelry business. Pham and her husband, Vu opened a jewelry supply business in the Asian Garden Mall in Westminster in 1989. Hung-Son was also located in the Asian Garden Mall. Pham received 15 kilograms of gold upon the death of her mother, and over the years managed to acquire another three kilograms.

In 2002 and 2003, Pham frequently went into Hung-Son, sometimes daily, to transact business. The Nguyen family operated Hung-Son, and Pham understood Van was the owner of the business. Pham frequently observed Van in the store dealing with customers. On one occasion in February 2003, when Pham delivered supplies to Hung-Son, Van handed the merchandise to her daughter, Trinh, directing her how to handle it. Van was the one who paid Pham for the merchandise. Pham frequently saw Do, Trinh, and Luan in the store and understood Do and Trinh worked there with their mother.

In 2003, Van began to gain Pham's trust as she told Pham about having known many of Pham's relatives when they all lived in Vietnam. Eventually, Pham mentioned having some gold and Van suggested Pham should loan it to her for her children to conduct business.

In February 2003, after discussing it with her husband, Pham took three kilograms of gold to Van, which Van said she was borrowing for her children. Van promised to pay $150 per month per kilogram for use of the gold.

Upon delivering the three kilograms of gold to Van, Van took a Hung-Son business card, wrote the details of the transaction on the back, dated and signed the card "Hung-Son", and gave the card to Pham (hereafter the "3 kilogram card"). Pham testified it was a common practice in the local Vietnamese jewelry trade to use business cards as IOUs and to return the business card to the debtor when the debt was repaid. Pham and her husband frequently received and gave such IOUs in conducting their business. As promised, in March and April 2003, Van paid Pham monthly for the loan of her gold with money she took out of the Hung-Son cash register.

In April 2003, Pham mentioned to Van that she had 15 kilograms of gold she had inherited from her mother. Van advised Pham she should put the gold to use. Van suggested Pham loan her the gold, again for her children's business, and it was agreed Van would now pay Pham a total of $1,800 a month for the use of all the gold.

After obtaining her husband Vu's consent, Pham took 10 kilograms of gold from the safe in her store and took it to the Hung-Son store. Van, Do, Trinh, and Luan were present. Van stated, in her children's presence, she was borrowing the gold from Pham for them to do their business, and they would be responsible for repaying the gold if Van did not. Luan took the 10 kilograms of gold from Pham, counted it, placed it in a bag, and left the store with the gold.

Pham then went back to her store, took another five kilograms of gold from her safe and returned to Hung-Son. Trinh opened the door for her, and Van directed Trinh and Do to take the gold and put it in the Hung-Son safe. Van then took a Hung-Son business card, which was introduced into evidence, and wrote on the back in Vietnamese: "Hoan [Pham] gave 15K of 24K gold bar (fifteen kilogram of 24K gold) Hung Son." The date Van wrote on the card was translated to be April 20, 2003. The

preprinted front of the Hung-Son card Van gave to Pham read: "Hung Son Inc. Diamond Center . . . Dealer for KIM LAN 9.999 sheet gold . . . Wholesale and retail gold sees & kilogram gold bar 24K . . . YEARS OF EXPERIENCE (SAI GON)[.]" Pham took the new Hung-Son card (hereafter the "15 kilogram card") and placed it in her safe.

Thereafter, as promised, Van paid Pham $1,800 a month. Pham collected the money monthly from Van at Hung-Son, and Van's children were often present.

A few days after giving Van the 15 kilograms of gold, Van asked Pham to loan her $10,000, for the purchase of merchandise for the business, promising to pay $200 a month interest on the loan. Pham agreed and gave $10,000 cash to Van, who again wrote the details of the transaction on a Hung-Son business card. The card, introduced into evidence, was dated April 24, 2003, and on the back was written: "Borrowed from Ms. Hoan 10,000.00 (ten thousand dollars) Hung Son." Although interest payments were made on the loan, the $10,000 was never repaid.

In February 2004, Van asked Pham to loan her $50,000 to buy merchandise and promised she would repay the loan as soon as the merchandise sold. Van promised to pay Pham $1,000 a month interest. Pham trusted Van because she had been making the agreed upon payments on the other loans. Pham took $50,000 cash to Van at Hung-Son. Do and Trinh were present when Pham presented Van with the cash. Van again wrote on the back of a Hung-Son business card, which she signed, dated, and handed to Pham. The card was dated February 7, 2004, and read "Hung Son received from Ms. Hoan 50,000.00 (fifty thousand dollars) Hung Son."

After receiving the $50,000 from Pham, Van ceased all payments to her. Pham spoke to Van many times about the debts, and Van kept saying business was slow and she could not pay Pham at the time. As of May 2005, Pham was still owed $60,000, and 18 kilograms of gold.

Eventually, Van said she could start repaying Pham one kilogram of gold per month in gold taels. Pham explained a gold tael is a small gold ingot about

one-and-one-half-inches by one-inch, and one kilogram of gold makes about 27 taels. Pham explained the Nguyen family owned two jewelry businesses: Hung-Son and Kim-Lan, which also manufactured gold taels.

In May 2005, Van gave Pham several gold taels some of which were stamped "Kim-Lan 99.9 percent pure gold." The other gold taels were stamped "Kim-Thanh" and "Ngoc-Bich." Over the next few months, Van gave Pham several more gold taels and diamonds, all towards repaying the gold she owed Pham. Each time Van gave Pham or her husband gold or diamonds, Van wrote in a ledger book she kept behind the counter at Hung-Son the details of the amount she had given Pham and how much was still owed, and either Pham or her husband would sign the ledger. By August 2005, Van had repaid the first three kilograms of gold and Pham returned the 3 kilogram card IOU to Van. Pham received 54 taels total from Van, 11 of which were marked "Kim-Lan." It turned out the Kim-Lan taels were not 99.9 percent pure gold, but were of lesser quality and not worth as much.

Pham testified she demanded Van show her the ledger book in which she kept track of the debts. Van gave her the book, and Pham took it and photocopied the pages pertaining to her. The next day, the police contacted Pham's husband Vu, and asked him to return the book, which he did.

Pham received no further payments after August 2005. Sometime after August 2005, Pham spoke with Van's husband, Tung. He promised she would get repaid in full if she would not file suit against the Nguyen family, but no payments were ever made.

Phuoc Vu

Pham's husband, Vu, confirmed much of her testimony. He and Pham had been in business at the Asian Garden Mall for 16 years and often saw Van, Do, Trinh, and Luan at Hung-Son. It was common practice in the community to memorialize "deals" on the back of business cards.

Vu and Pham loaned 18 kilograms of gold and $60,000 cash to Van. Van wanted the gold to produce Kim-Lan gold taels. The cash was to buy diamonds and other merchandise to sell at Hung-Son. The Kim-Lan gold taels that were given back to Pham and Vu were stamped 99.9 percent pure, but they turned out to be only about 97 percent gold.[2]

The ledger Pham obtained from Van had the same handwriting as on the cards she received from Van. After Pham received the ledger, Vu talked to the police and arranged to return it. No charges were filed against Pham or Vu concerning the ledger.

After August 2005, Vu also spoke to Tung about the unpaid debt, which Tung promised to repay so long as Vu and Pham did not file suit. Vu also spoke to Do about the loans, and Do assured Vu that if Van did not repay the debts, he and his siblings would.

Trinh Nguyen

Trinh testified she worked at Hung-Son as a salesperson but did not get paid. She testified Hung-Son was owned by her brother, Do, and denied being an owner or partner. Pham introduced into evidence a fictitious business name statement filed in 1995 on which Trinh and Do were listed as doing business as partners in Hung-Son. Trinh said the signature on the statement was similar to hers. Trinh denied ever being a manager of Hung-Son; Pham introduced Trinh's interrogatory responses stating she managed the store from 1999 to 2005.

Trinh testified her mother never worked at or had anything to do with Hung-Son, but she did come to the store to visit occasionally. Trinh denied that Van ever conducted any business on behalf of Hung-Son, and Van never wrote on the back of business cards concerning debts. The entire Nguyen family was in San Jose and

[2] An assayer testified to legally be called "pure gold," gold must be no less that 99.69 percent gold. He tested the Kim-Lan taels, and they ranged from 97.33 percent gold to 98.33 percent gold.

Hung-Son was closed for another brother's wedding on April 20, 2003 (the date written on the 15 kilogram card). Trinh denied Luan worked at Hung-Son, and she did not know if he was a part owner of the store.

Trinh saw Pham at Hung-Son a few times, but never saw her speak to Van and never saw Van receive gold or money from Pham. Trinh denied knowing anyone named Anna (or Kim) Quach or Christopher Huynh and denied having ever received checks from those persons or written checks to those persons.

Tung Nguyen

Van's husband, Tung, denied having ever spoken to Pham on the telephone. He testified Hung-Son was owned by Do alone, and Van had nothing to do with the store.

Luan Nguyen

Luan testified he had owned a jewelry business called Kim-Lan, but it closed in 1999. He now operated a different business called "Vina Serve" from the same location. He admitted the sign at that location still said Kim-Lan.

Luan denied that Kim-Lan made gold taels and testified Kim-Lan did not manufacture the Kim-Lan gold taels Pham introduced into evidence. Luan testified he was never in business with Van and he never worked at Hung-Son—he would occasionally be in the store visiting. Luan never received any gold from Do, Hung-Son, or Van. He never saw Pham or Vu at Hung-Son, and never saw Pham give any gold or cash to Van. Luan denied knowing anyone named Anna (or Kim) Quach, Diana Huynh, or Christopher Huynh.

Do Nguyen

Do testified he opened Hung-Son in 1997 as a sole proprietorship, never had any partners, and Luan was not a shareholder. Pham introduced Do's deposition testimony that Luan was his partner in Hung-Son.

Do testified Van never worked in the store and she only came there occasionally to visit. Van never wrote on the back of Hung-Son business cards. Do never received any cash or gold from Pham.

Do testified that in 1999 he had planned to distribute Kim-Lan gold taels, but the deal fell apart. He admitted that in 2000 he began advertising Hung-Son was the exclusive distributor of Kim-Lan gold taels.

Do denied knowing anyone named Anna (or Kim) Quach, Diana Huynh, or Christopher Huynh. Do denied he ever borrowed money from, or wrote checks to, anyone with those names.

Cao Cam Van

Van testified Do was the sole owner of Hung-Son, she never worked there, and only occasionally went there to visit. She never dealt with customers in the store, opened the cash register, opened the safe, or looked in the "loupe" (magnifying instrument for examining diamonds). Van denied she ever appeared in advertisements for Hung-Son. Van denied she ever borrowed money or gold from anyone for her or her children to conduct business.

Pham introduced into evidence an advertisement from an April 2003 Vietnamese newspaper identifying Van and Tung as the owners of Hung-Son and congratulating them on their son's recent wedding. Pham introduced into evidence a tape of a 2007 television ad for Hung-Son in which Van appeared. And she introduced a surveillance videotape made of Hung-Son showing Van working inside the store, opening the cash register and the safe, showing jewelry to customers, and using the diamond loupe.

Van testified she had no idea who owned Kim-Lan, and did not know if her son Luan ever owned a jewelry store. Van testified she only ever met Pham once or twice—just to say hello as she passed through the store and never spoke to her. She denied receiving any gold or cash from Pham. Van testified she never wrote on the back

of Hung-Son business cards, and the writing on the back of the cards introduced into evidence was not hers. Van denied she ever wrote in a ledger book at Hung-Son. Van denied she knew anyone named Anna (or Kim) Quach, and she never borrowed money from, or wrote on the back of Hung-Son business cards concerning loans to, anyone with that name.

Phuong Pham

Phoung Pham, who worked in a store in the Asian Garden Mall five days a week, was called as an impeachment witness. Phoung Pham testified she knew Pham, Vu, and the Nguyen family. She saw Van all the time inside Hung-Son dealing with customers. In 2004 and 2005, she saw Van talking to Pham inside Hung-Son between 20 and 30 times, and she frequently saw Van's children at the store talking to Pham as well.

Thanh Truong

Thanh Truong, who owned a store in the Asian Garden Mall, was also called as an impeachment witness. She also knew Pham, Vu, and the Nguyens, who she described as being "all from the same store." Thanh Truong saw Van inside Hung-Son every day, often by herself, dealing with customers and suppliers. She saw Pham inside Hung-Son many times talking to Van. She frequently saw Tung (Van's husband), Do, and Luan in the store, and often saw Luan dealing with customers in the store.

Anna Quach

Anna Quach (who also used the first name Kim) was called to testify. As with other impeachment witnesses, she was not named on Pham's witness list and no objection was made by defense counsel when she was called.

Quach testified that in 1999 she bought Kim-Lan gold taels from Van at Hung-Son. From 1999 through 2003, Van borrowed money from Quach on about 20 occasions. The loans totaled $830,000. Each time Van borrowed money, she wrote the details of the loan on the back of a Hung-Son business card—writing the date and the

amount, then signing the back of the card and giving it to Quach. Van told Quach the money was to buy gold and diamonds for her children to conduct business. Van repaid Quach some of the principal but still owed her $630,000. Van had been paying Quach monthly interest on the loans at a rate of $100 per every $10,000 borrowed but had ceased making those payments.

On the next trial day, Pham's counsel continued to examine Quach. When he introduced Hung-Son business cards Quach that claimed documented the loans she had made to Van, defense counsel objected because he had never seen the cards before. Pham's counsel explained Quach and the cards were impeachment evidence, defense counsel knew Quach was a potential impeachment witness because in depositions the Nguyens were repeatedly asked about loans from Quach and they denied knowing her. Defense counsel agreed he knew about Quach but did not know about the documents. The court concluded the evidence was admissible for impeachment purposes.

Pham's counsel questioned Quach more and placed into evidence six Hung-Son business cards Quach claimed represented three loans of $250,000, one loan of $10,000, one loan of $20,000, one loan of $50,000 from Quach to Van. Quach testified there had been 20 cards originally for smaller amounts, but then Van complained there were too many IOU's to keep track of so Van consolidated large chunks of the debt onto three $250,000 cards, and took back all the original cards except the three others for smaller amounts.

Quach admitted she had only sporadically worked (as a manicurist and selling baked goods) and had limited income. But she explained the funds for the loans to Van came from multiple sources including life insurance proceeds she received following her mother's death, credit card advances, and a home refinance. Quach also had her children Diana Huynh and Christopher Huynh advance funds for the loans. Quach testified Van had gained her trust because she had made small loans to Van at first, which were repaid with interest.

Pham introduced into evidence photocopies of numerous cashiers checks and personal checks (that had been negotiated), which Quach claimed represented various loans she had made to Van. Quach explained that sometimes Van would direct her as to the payee on the checks, and sometimes have her leave the payee blank so her children could decide how to make the checks payable. The checks included a January 2002 cashier's check for $15,000 purchased by Christopher Huynh payable to Trinh Nguyen; a January 2002 cashier's check for $15,000 purchased by Christopher Huynh payable to Hung-Son; two November 2002 cashier's checks each for $100,000 purchased by Diana Huynh payable to Do Nguyen; a November 2002 cashier's check for $100,000 purchased by Anna Quach payable to Hung-Son; a July 2003 cashier's check for $50,000 purchased by Anna Quach payable to Hung-Son; a personal check dated October 2003 for $5,000 from Diana Huynh payable to Vina Serve (Luan's business) with "for H-S" written on the notation line; a personal check dated October 2003 for $10,000 from Diana Huynh payable to Vina Serve with "for H-S" written on the notation line; and a personal check dated October 2003 for $10,000 from Diana Huynh payable to Trinh Nguyen.

Finally, Pham introduced photocopies of three uncashed checks Quach possessed. The three checks, all dated January 6, 2005, were written on the bank account of Hung-Son, Inc., in the amounts of $100,000, $280,000, and $310,000. Each had the words "don't deposit" written on the notation line. Each was signed "Do Nguyen." Quach testified the three checks were written and signed by Trinh in the Hung-Son store, at Van's direction after Quach had confronted Van about failing to pay the loans. Van told Quach she could not deposit the checks because there was not money in the account to cover them, but the checks would serve as additional "proof" of the debt. Do, Trinh, and Van were present when the checks were written.

Defense counsel objected to admission of the various checks and Hung-Son business cards because he had never seen the documents before. And although defense

counsel complained he had been surprised by Quach's testimony, in moving to exclude the checks and cards he specifically stated it was not Quach's testimony he sought to exclude, but rather the documents she produced because they had not been produced in discovery.[3]

At various times during Quach's examination, the trial court chastised Pham's attorneys for their trial tactics, noting defense counsel had been surprised by Quach and her documents, and it criticized counsel for having turned "a little bit of impeachment[,]" into a full trial on the Quach transactions. Nonetheless, the court concluded because Quach's testimony and the documents were offered for impeachment purposes, Pham was not required to disclose Quach as a potential trial witness and the documents were admissible.

Defense Case

Luan testified for the defense that he never met Pham, and was in San Jose for his brother's wedding on April 20, 2003 (the date on the 15 kilogram card). He denied knowing anyone named Diana Huynh or Anna (or Kim) Quach and assumed that if either wrote checks payable to him or Vina Serve it was for services his company performed.

An employee for the alarm company that provided services for Hung-Son testified the company's records showed the store alarm was armed on the afternoon of April 18, 2003, and not disarmed again until April 23. Account notes indicated someone identifying himself as Luan Nguyen had called the alarm company to advise the Hung-Son store was going to be closed those days.

---

[3] Counsel stated, "our position is that all of . . . Quach's—not her testimony but all of the documents and all the evidence she produced should not be admitted; that the plaintiff knew these documents existed prior to when discovery was propounded . . . ."

On rebuttal, Pham testified her assertion the 15 kilogram gold transaction took place on April 20, 2003, was based on the fact Van wrote that date on the card. She had no independent recollection of the actual date of the transaction.

Procedure

Following presentation of evidence, the defense moved for nonsuit on all causes of action. The court agreed several of the complaint's causes of action (e.g., breach of implied covenant, unfair competition, conspiracy) had not been proven, but the court denied the motion as to the breach of oral contract cause of action and the various fraud and misrepresentation causes of action.

The jury returned a special verdict finding in Pham's favor on all causes of action submitted to it. As to Van, Do, and Hung-Son, the jury found them liable for breach of oral contract. As to all the defendants, the jury found them liable on causes of action for fraud, concealment, false promise, intentional and negligent misrepresentation, conversion, and a common count of money had and received. The jury awarded damages of $435,308 against all the defendants jointly and severally.

Defendants filed a motion for new trial on the grounds they had been surprised by the testimony of Quach and the documents she produced. They argued Quach's testimony was not simply impeachment evidence but was substantive proof of Pham's case because it demonstrated a common plan or scheme, and thus should have been disclosed prior to trial. In denying the motion, the court commented it had allowed the evidence in for impeachment purposes only. The court observed Quach's testimony went directly to demonstrate "Van in particular was an abject liar." The court commented that at the conclusion of trial it had told counsel it intended to refer the matter for prosecution for perjury because in the court's view Van "sat on the witness stand and under no circumstances considered the truthfulness of any statement that she made." While the court recognized defense counsel had been "stunned and completely surprised by the appearance of . . . Quach, the reality is that the testimony was allowed strictly and

exclusively because it was in fact impeachment testimony with respect to . . . Van." The court also denied the defendants' motion for judgment notwithstanding the verdict.

II

THE QUACH EVIDENCE

Appellants raise two issues concerning the Quach evidence. First, they contend the trial court erred by admitting her testimony and the documents she produced because she was not identified on Pham's witness list and the documents were not produced in discovery. Second, appellants contend the trial court erred by denying their motion for new trial brought on the grounds of surprise. Neither contention has merit.

A. Admissibility

Appellants contend the trial court erred by admitting any of the evidence concerning the Quach transactions because Quach was not identified in Pham's witness list and the business cards and checks pertaining to her testimony were not produced during discovery. We apply the deferential abuse of discretion standard of review. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901.)

The trial court did not abuse its discretion in admitting the testimony and the documents. Both were offered for impeachment purposes and thus did not require disclosure. (See Super. Ct. Orange County, Local Rules, rule 450.)

Furthermore, to the extent appellants are challenging the admissibility of Quach's testimony, they have waived the argument. When Quach was initially called as a witness, there was no objection by defense counsel on the first day on which she testified. When Quach returned the next day to testify, defense counsel did not object until Pham's counsel began to ask Quach whether Van gave her any Hong-Sun business cards as IOUs. Counsel only complained about admission of the documents—not Quach's testimony. Later, defense counsel specifically told the court he was not objecting to Quach as a witness, only to the admission of the documents (i.e., the business cards and checks) she had produced to support her testimony.

Appellants argue that even though offered and admitted for impeachment purposes, the Quach evidence also served as substantive proof of Pham's case because it demonstrated a common scheme. Accordingly, the evidence should have been disclosed in discovery. They complain that in closing argument, Pham's counsel argued the Quach evidence showed a "similar scheme" was perpetrated against her. But there were no objections by defense counsel to the line of argument nor was there a request for any admonition to the jury that it could only consider the evidence for impeachment purposes. (See *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 468, fn. 3 ["Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished"].) Furthermore, we have reviewed the closing arguments in their entirety, and in context, counsel's comments about the Quach evidence were made in regards to its bearing on assessing the credibility of appellants' testimony, not as substantive proof of Pham's claims.

B. Denial of New Trial Motion

Appellants contend the trial court erred by denying their motion for new trial. "When the court has denied a motion for a new trial . . . we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion. [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) We have reviewed the entire record and reject their claims.

Appellants' motion was brought under Code of Civil Procedure section 657, subdivision (1), which provides for new trial when there has been "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." They contended the court's erroneous admission of the Quach evidence constituted grounds for a new trial. Inasmuch as we have found no abuse of discretion in admitting the Quach

impeachment evidence, we need not address this point further. Additionally, we note that although on appeal appellants argue new trial was warranted under this subdivision, they engage in no reasoned legal analysis of the contention and thus it is waived. (*People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 [appellant must present factual analysis and legal authority on each point made or argument deemed waived].)

Appellants' motion was also brought on the grounds of surprise under Code of Civil Procedure section 657, subdivision (3), which allows the trial court to grant a new trial when "[a]ccident or surprise, which ordinary prudence could not have guarded against[,]" has occurred and has "materially affect[ed] the substantial rights of [the moving] party." They contend they were unfairly surprised by the Quach evidence and thus were unable to defend themselves against her claims.[4]

"'The terms "accident" and "surprise," although not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own [citation], which ordinary prudence could not have guarded against. [Citation.]' [Citations.]" (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432 (*Kauffman*).)

We cannot say the court abused its discretion by rejecting appellants' claims. The record demonstrates they were well aware of Quach and her claims—they were repeatedly asked in their depositions if they knew her (or her children) and denied that they did. At trial, defense counsel specifically commented the defense knew about

[4] Appellants have filed a request for judicial notice of pleadings in an action filed by Quach against them *after* judgment in this action was entered, and an order sustaining their demurrer to that complaint with leave to amend. They assert these court documents demonstrate they have viable defenses to Quach's claims (including statute of limitations and the Quach loans to Van were usurious), which they could have exploited to impeach Quach had she been disclosed as a potential witness. The documents are of no relevance to this appeal. We deny the request for judicial notice.

Quach—they just did not know she had documents to support her claims. The court repeatedly noted the testimony and documents were strictly for impeachment purposes.

Furthermore, "where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict. He must act at the earliest possible moment for the 'right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause.' [Citations.]" (*Kauffman, supra*, 31 Cal.2d at p. 432.) Despite the court's observations during trial that defense counsel was surprised by the documents produced by Quach, Appellants did not request a continuance or mistrial. They did not raise the Quach evidence as grounds for a new trial until after the jury verdict against them came in. Having waited to see the jury's verdict, they cannot now be heard to complain.

III

SUFFICIENCY OF EVIDENCE

Appellants contend the evidence is insufficient as a matter of law to support a judgment against Van's children Do, Luan, and Trinh, and her husband, Tung.[5] We reject their claims.

Although an appellant's duty on appeal is well established, we feel compelled to set forth the basics. A judgment is presumed to be correct and the burden of demonstrating error rests squarely on the appellant. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632, and cases cited therein.) When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*), see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [appellate court not required to consider points not

[5] They do not challenge the sufficiency of the evidence to support the judgment against Van or either of the corporate defendants Hung-Son and Kim-Lan.

supported by citation to authorities or record].) An appellant may not simply make the assertion that the ruling is erroneous and leave it to the appellate court to figure out why.

Furthermore, "[w]here the appellant challenges the sufficiency of the evidence, the reviewing court starts with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's affirmative burden to demonstrate otherwise. [Citations.] The appellant's brief must set forth *all* of the material evidence bearing on the issue, not merely the evidence favorable to the appellant, and must show how the evidence does not sustain the challenged finding. [Citations.] If the appellant fails to set forth all of the material evidence, its claim of insufficiency of the evidence is forfeited. [Citations.]" (*Cequel III Communications I, LLC, v. Local Agency Formation Com. of Nevada County* (2007) 149 Cal.App.4th 310, 329, fn. 7.)

And finally, here the jury returned verdicts against Do, Luan, Trinh, and Tung on multiple causes of action and damages were not apportioned between the causes of action. Thus, if we may affirm on any one of the causes of action, we need not address the others. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 [affirm if correct on any theory].)

Appellants' opening brief sets forth *none* of the evidence supporting the judgment against them. Instead, for a recitation of the facts of the case they quote a page from Pham's points and authorities filed in opposition to their motion for judgment notwithstanding the verdict and assert the evidence summarized therein is insufficient to support the judgment. Counsel's argument is not evidence. (*In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, 1083.) For this reason we deem the sufficiency of the evidence arguments waived.

Appellants' attack on the judgment fails for other reasons as well. We briefly highlight just a few.

Do (along with Van and Hung-Son) was found liable on the breach of contract cause of action. On appeal, appellants challenge this verdict with three sentences devoid of any legal analysis, citation to authorities, or discussion of the evidence, that boil down to: there was no evidence of a contract enforceable against Do because the deals were negotiated by Van. Because of the lack of reasoned argument, citations to authority, or discussion of the evidence, the argument is waived. (*Badie, supra,* 67 Cal.App.4th at pp. 784-785.)

Do, Luan, Trinh, and Tung were found liable for the common count of money had and received.[6] Their challenge to the jury's verdict on this cause of action is comprised of one sentence: "There is no evidence that [Pham] lent any money to any of [them]." We deem the challenge to this verdict waived as well and may affirm the judgment based on this cause of action. (*Badie, supra,* 67 Cal.App.4th at pp. 784-785.)

Do, Luan, Trinh, and Tung contend there is insufficient evidence to support the verdict on the intentional and negligent misrepresentation causes of action. Again, the argument consists of a single sentence: "This claim must fail as a matter of law because there is no evidence of any misrepresentation made by the Non-[Van] defendants." That simply is not sufficient to invoke appellate review of the verdict. (*Badie, supra,* 67 Cal.App.4th at pp. 784-785.)

Furthermore, to the extent the argument may be gleaned from appellants' challenge to the verdict on the fraud cause of action, it appears to be that actionable misrepresentation requires a "'positive assertion'" (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297), and because it was Van who made the promises to

---

[6] A cause of action for money had and received will lie "'. . . wherever one person has received money which belongs to another, and which "in equity and good conscience", or in other words, in justice and right, should be returned. . . .'" (*Mains v. City Title Insurance Co.* (1949) 34 Cal.2d 580, 586.)

Pham, it follows that Do, Luan, Trinh, and Tung did not engage in any positive misrepresentations. But "[a] misrepresentation need not be oral; it may be implied by conduct. [Citations.]" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567.) There is evidence Do, Trinh, and Luan were present when Van obtained large quantities of gold from Pham representing to her the gold was for them to conduct their business and if she was unable to repay it, they would. There is no evidence any of them contradicted their mother, and their subsequent conduct certainly could be found to be a positive assertion to Pham concerning security for her investment. Luan counted out the first 10 kilograms of gold, placed it in a bag, and departed the store with it. When Pham delivered the next five kilograms, Trinh and Do took the gold and secured it in the safe.

We agree there were no apparent actionable misrepresentations made by Tung. There was no evidence he was present during any of the loan transactions. Pham and Vu testified that after payments had ceased, Tung told them he would make sure they were repaid if they did not sue the family. But there is no evidence they relied on those statements to their detriment. But our conclusion does not aid Tung as the judgment may nonetheless be affirmed on other grounds, i.e., common count of money had and received.

Appellants argue at length that as a matter of law there was insufficient evidence of a civil conspiracy between Van and the other individual defendants. The trial court apparently agreed because it granted their motion for nonsuit on the conspiracy cause of action, the jury was never instructed on the conspiracy cause of action, and it was never submitted to the jury. We decline to address this point further.

IV

"LUAN CAO NGUYEN aka HUNG CAO NGUYEN"

Luan was named in the complaint and judgment as "Luan Cao Nguyen [also know as (aka)] Hung Cao Nguyen." Appellants complain the court should not have

entered a judgment against Luan with the aka "Hung Cao Nguyen." They argue the only evidence at trial supporting use of the aka was that Luan appeared in ads for Hung-Son identifying himself as "Cao Hung," which is a different name than "Hung Cao Nguyen." Appellants also contend the use of the aka in the judgment could have adverse consequences for a brother in the Nguyen family who lives in San Jose, who is not a party to this action, and whose name is in fact, "Hung Cao Nguyen."

We conclude to the extent appellants are attempting to protect their family member who is not a party to this action, they lack standing to do so. (See *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1808 [appellants may not assert error that injuriously affects nonappealing parties].) Furthermore, the record is clear the judgment is against only Luan, not his nonparty sibling.

The issue was discussed at length in the trial court at the hearing on the motion for new trial. Defense counsel asked the court to delete the name "Hung Cao Nguyen" from the judgment because "Hung Cao Nguyen" is "the one in San Jose, [who] [Pham's] counsel concedes has nothing to do with this case, [he] is completely a different person." Pham's counsel objected, noting appellants had not raised this issue before, even though the complaint and the special verdict forms named Luan with the aka. Counsel explained Pham had not sued the brother in San Jose, nor was the judgment against the brother in San Jose. Pham sued Luan who also sometimes used the name "Cao Hung" in commercials. "Cao" was the common middle name used by all the brothers in the Nguyen family. The court denied the request to modify the judgment noting the confusion in names used by Luan. The court emphasized the judgment was against Luan Cao Nguyen aka Hung Cao Nguyen, and not against any other individual

person (i.e., the brother) who was also named Hung Cao Nguyen.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.